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No. 94-1111

In The

Supreme Court of the United States

October Term, 1994

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors,

Petitioners,

v.

Seattle-First National Bank and SeaFirst America Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

This case arises from the Chapter 11 debtor petitioners' efforts to reform a substantially consummated plan of reorganization to impose a substantial tax burden on their creditors even though the petitioners are not injured by the tax provisions of the plan. More specifically, the following issues are presented:

1. Was the court of appeals consistent with the standard established by the circuit courts of appeal and this Court in dismissing the appeal as moot under the circumstances?

2. Did the court of appeals err in refusing to remand the case for the limited purpose of allowing the petitioners to conduct discovery on the mootness issue?

3. Did the court of appeals' dismissal of this appeal on mootness grounds, despite petitioners' numerous, repeated requests for a stay, violate the due process principle of "fundamental fairness" as well as the "fresh start" policy of the Bankruptcy Code?

LIST OF PARTIES

The participants in the proceedings below were:

Petitioners:

Clinton Manges

Duval County Ranch Company

Man-Gas Transmission Company

Respondents:

Seattle-First National Bank

SeaFirst America Corporation

SeaFirst America Corporation is a wholly owned subsidiary of Seattle-First National Bank, which is a wholly owned subsidiary of Seafirst Corporation, which is a wholly owned subsidiary of BankAmerica Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, Seattle-First National Bank ("**SeaFirst**") and SeaFirst America Corporation ("**SFA**"), respectfully oppose the Petition for Writ of Certiorari in this case because the Fifth Circuit Court of Appeals correctly followed controlling law in dismissing the appeal on the grounds that "substantial consummation" of the plan of reorganization and the inability to provide the relief requested without imposing inequitable consequences rendered the appeal moot.

OPINIONS AND JUDGMENT BELOW

The Respondents incorporate by reference the Petitioners' statement of opinions and judgments below.

JURISDICTION

The Respondents incorporate by reference the Petitioners' statement of jurisdiction.

STATUTE INVOLVED

11 U.S.C. § 1127(b) (West 1993):

> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

STATEMENT OF THE CASE

The Proceedings Below

The Petitioners here and debtors below were Clinton Manges ("**Manges**"), Duval County Ranch Company

("**DCRC**"), and Man-Gas Transmission Company ("**Man-Gas**") (collectively, the "**Manges debtors**"). Manges was the sole shareholder of DCRC and Man-Gas. DCRC's principal asset was the 98,000 acre Duval County Ranch (the "**Ranch**"). Working mineral interests interspersed throughout 140,000 acres in Duval and Webb Counties, Texas were the principal assets of Man-Gas. The Manges debtors sought protection from their creditors under the Bankruptcy Code beginning in 1989. After twenty-one months of refuge in the United States Bankruptcy Court for the Southern District of Texas sitting in Corpus Christi, the bankruptcy court confirmed a liquidating plan of reorganization proposed by creditors SeaFirst and SFA (the "**Creditor Plan**").

The court issued findings of fact and conclusions of law (Petitioners' App. at 49-80), including: (a) that the Creditor Plan was proposed in good faith (No. 13); (b) that the principal purpose of the Plan was not the avoidance of taxes (No. 38); and (c) that there was no equity in any of the property of the estates subject to liens (No. 48). The Creditor Plan created a liquidating trust to hold title to and sell the Manges debtors' assets (the "**Trust**"). The Creditor Plan also designated the Trust as a grantor trust so that any income tax from the gain on sales of certain assets would be absorbed by the debtors' tax attributes. The Trust is not a party to this appeal.

The Manges debtors and one unsecured creditor[1] appealed to the district court. (R.E. 6)[2]. In designating the record, the Manges debtors identified twenty-seven appellate points and contended that thirty-eight of the bankruptcy court's findings of fact were clearly erroneous. (R. 0830). They filed emergency motions for a stay pending appeal in the bankruptcy and district courts. (R. VIII.14). Both courts rejected the attempts to stay implementation of the Creditor Plan, as did the Fifth Circuit Court of Appeals when the appellants sought a writ of mandamus to compel the district court to issue a stay. *In re Duval County Ranch Co.*, No. 91-2764 (5th Cir. July 31, 1991). The bankruptcy court outlined many reasons for denying a stay in a six page order. Appendix at A-6. The district court held a hearing, heard the testimony of several witnesses, reviewed the documentary evidence, heard the argument of counsel for various parties, and considered extensive memoranda of law. Appendix at A-11.

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[1] The Law Offices of Royal D. Adams, Manges' counsel in pre-bankruptcy litigation.

[2] The record below contains four classes of reference: (a) Appellants' Record Excerpts, designated as **R.E.**; (b) the district court record, designated **R.** followed by four-digit page numbers (*e.g.*, **R. 0001** is page 1 of the record); (c) transcripts and pleadings, designated by Roman numerals for the volume followed by a page number (*e.g.*, **R. XIII.396** is page 396 of volume 13 of the transcript); and (d) documents from the bankruptcy court included in the appeal to the district court, designated by exhibit references in capital letters (*e.g.*, **R. Ex. N.31** is document 31 in the bankruptcy court's Exhibit N).

In the district court, the Manges debtors submitted a 76-page principal brief urging fourteen grounds for reversal. (R. 0706). Also during the course of the district court appeal, SeaFirst and SFA moved to dismiss the appeal under the mootness doctrine. (R. 0382). On May 3, 1993, the district court denied this motion because the Ranch and mineral interests had not yet been sold, but affirmed the confirmation order. (Petitioners' App. at 23-32) (R. 0084).

On May 12, 1993, the Manges debtors appealed to the Fifth Circuit Court of Appeals. (R. 0061). On May 14, 1993, they sought from the district court and were denied an emergency stay of the Creditor Plan. (R. 0033; R. 0031). On May 24, 1993, they filed an emergency motion for stay in the court of appeals, which was denied. On June 3, 1993, SeaFirst and SFA filed a notice of appeal of the district court's denial of their motion to dismiss under the mootness doctrine. (R. 0001).

On September 7, 1993, the Manges debtors filed an amended motion for stay of the Creditor Plan pending appeal. Following a response to this motion by SeaFirst and SFA, the court of appeals denied the amended request on September 15, 1993.

In their principal brief to the court of appeals, the Manges debtors continued to seek a complete reversal of the bankruptcy court's order confirming the Creditor Plan. The Manges debtors' principal argument concerned the impact on the Creditor Plan of this Court's decision in *Holywell Corporation v. Smith*, 503 U.S. ___, 112 S. Ct. 1021 (1992), which was issued nine months after confirmation

of the Creditor Plan. In response, SeaFirst and SFA pointed out that:

* the IRS did not oppose the Creditor Plan;
* the *Holywell* plan neither addressed the taxable status of its liquidating trust nor the trust's obligations regarding post-confirmation return filing;
* the Creditor Plan specifically addressed these matters and the IRS did not object or appeal, thereby binding the IRS; and
* any failure of the bankruptcy court to anticipate this Court's decision in *Holywell* constituted harmless error since there was no evidence that Manges would face any post-confirmation income tax liability and, even if there had been such evidence, the record established that any tax liability most likely would not exceed his tax attributes.

On December 16, 1993, the Ranch and mineral interests were sold by the Trust. On January 18, 1994, SeaFirst and SFA filed their reply to the Manges debtors' response on the mootness issue. That brief disclosed the December 16 sale of the properties and asked that the appellate court take judicial notice of the certified copies of deeds and assignments executed by the Trust to the third-party purchasers.

On February 15, 1994, the Manges debtors moved to remand the case to the district court for discovery on the mootness issue. They complained about the lack of knowledge regarding the transaction or sale documents that resulted in the filing of the deeds and assignments provided to the court earlier. In response, SeaFirst and

SFA supplied executed copies of *all* agreements between the purchasers of the Ranch and mineral interests and the Trust and Respondents. Accompanying those documents were declarations under penalty of perjury verifying both the documents' authenticity and the fact that they comprised all agreements concerning the sale and transfer of the Ranch and mineral interests (Appendix at A-1 through A-4), which were filed with the appellate court and served on the Manges debtors.

The motion to remand was denied on March 11, 1994. Oral argument on the appeals took place on May 3, 1994, and, in a written opinion concluding that it would be "plainly inequitable" for the court to consider the merits of the appeal, the appeal was dismissed on August 29, 1994. *Matter of Manges*, 29 F.3d 1034, 1044 (5th Cir. 1994) (Petitioners' App. at 1-22). The Manges debtors' petition for rehearing was denied on September 27, 1994 (Petitioners' App. at 107-09) and their Petition for Writ of Certiorari followed.

Statement Of Facts

Beginning in about 1980, SeaFirst loaned millions of dollars to Manges and Man-Gas. DCRC guaranteed the loans. The loans went into default, SeaFirst sued the Manges debtors, and a 1985 settlement resulted in an agreement by the Manges debtors to make certain payments. The revised debtor-creditor relationship included as collateral DCRC's 98,000 acre Duval County Ranch and extensive mineral working interests in Duval and Webb Counties, Texas owned by Man-Gas.

The Manges debtors soon defaulted on the 1985 settlement, SeaFirst sued them in 1986, and reached a settlement in 1988. The 1988 settlement included a final judgment, on which the bank could execute in the event of default, and required monthly payments in excess of $200,000 per month for one year and a balloon payment in August 1989 of $30 million. The Manges debtors defaulted on the last monthly payment and the balloon payment and SeaFirst set in motion a judicial sale of the Ranch and mineral interests. DCRC interdicted the judicial sale by filing a Chapter 11 bankruptcy petition. *Seattle-First National Bank v. Manges*, 900 F.2d 795, 797 (5th Cir. 1990). Involuntary petitions against Manges and Man-Gas followed shortly thereafter. Those cases later were converted to voluntary Chapter 11 cases.

The Manges debtors admitted to owing over $70 million to secured creditors and owning slightly over $33 million in assets. (R.0337). Though SeaFirst was the largest creditor of the estates, it was not the only creditor holding a significant claim: according to their liquidation analysis, the Manges debtors owed over $4.7 million in *ad valorem* taxes on the Ranch and mineral interests. (*Id.*). The Manges debtors also admitted that unsecured creditors held pre-petition claims: (1) against DCRC of $2,022,769 (R. Ex. E); (2) against Man-Gas of $1,788,431 (R. Ex. F); and (3) against Manges of $2,657,454. (R. N.33).

The bankruptcy court held hearings on confirmation of the debtors' "Revised Third Amended Plan of Reorganization" on January 15, 1991. (R. Ex.P. at 4). That same day, the debtors defaulted on a court-ordered payment to SeaFirst, triggering the lifting of a temporary stay that had prevented the judicial sale of the Ranch ordered by

the federal district court in San Antonio. (*Id.* at 6). SeaFirst purchased the Ranch on January 16, 1991, at a sale conducted by the United States Marshal. Since their plan depended on DCRC's ownership of the Ranch, the debtors then proposed a "Third Modification to Revised Third Amended Plan of Reorganization." (*Id.*). After a hearing on this version, the court denied confirmation, concluding that the proposal: (a) was not feasible; (b) violated the absolute priority rule; (c) failed to give secured creditors the indubitable equivalent of their claims; and (d) was not fair and equitable. (*Id.*). The Manges debtors did not appeal the denial of confirmation of their plan.

While the Manges debtors were proposing plans, amended plans, revised amended plans, and modified revised amended plans, SeaFirst and SFA submitted their own plan. (R.E.10). The basic provisions of the Creditor Plan were straightforward. The January 16, 1991, Marshal's sale would be rescinded thereby revesting title to the Ranch in DCRC's estate. A liquidating trust ("**Trust**") would be established, into which all estate property would be transferred. (Petitioners' App. at 54, para. 17). A bank officer would serve as trustee without charge to the Trust. (*Id.*). The stock of DCRC and Man-Gas would be abandoned to Manges. (*Id.* at 64, para. 46) Manges was given time to terminate the subchapter S election for Man-Gas thereby making DCRC and Man-Gas "C" corporations. (Petitioners' App. at 60, para. 39(c)). The Trust would collect all assets of the Manges debtors, maintain them until they could be sold, and then sell them for the benefit of the creditors. (*Id.* at 54, para. 17). Proceeds from the sale of an asset would reduce debt secured by that

asset, and any remainder would be distributed among allowed unsecured creditors. (R.E.10 at 10). The claims of all ad valorem taxing authorities would be paid in full following confirmation. (*Id.* at 8-9). The secured claims of SeaFirst and SFA were to be paid after the sale of certain assets. To the extent sales proceeds did not satisfy all of SeaFirst's claim – which was anticipated – the estimated $36 million unsecured portion of its claim would be subordinated voluntarily to the claims of all other unsecured creditors, and would not be paid unless and until all creditors' claims in Classes 1-5 (administrative expense, taxes, wages, and unsecured claims) and 16 (small claims) are satisfied in full. (R.E. 10 at 9). SeaFirst also agreed to pay the over $500,000 in Priority Government Claims, of which the IRS was owed over $300,000.

Funds to pay administrative expense and general unsecured claims would come from: (1) a $1.3 million cash contribution donated by SeaFirst; (2) recovery from post-petition litigation; and (3) sales proceeds in excess of existing secured claims. (R.E. 10 at 18-19). In addition to paying administrative expense claims, which included the Manges debtors' attorney fees, SeaFirst waived its own administrative expense claim for unpaid adequate protection and contempt awards, estimated to be between $1.7 and $2 million. (R.IX.86).

The Creditor Plan was supported by over 90% of the non-insider creditors, and by over 96% of all claims against the estates. Twice during the confirmation hearings – at both the commencement and the close of the evidence – the IRS, which had objected to the Creditor Plan, withdrew its objections. (R.IX.10; XII.396).

A central feature of the Creditor Plan was the designation of the Trust as a grantor trust, which imposed any post-confirmation income tax liability on the "grantors" as opposed to the Trust and creditors. This potential tax liability was only theoretical, however, since the undisputed evidence resulted in these findings by the bankruptcy court:

> (c) There should not be any significant post-confirmation income tax liability to Manges due to the availability of tax attributes, the value of the collateral, the availability of subchapter S termination, and the lack of personal liability to Manges for DCRC's taxes.
>
> (d) Even in the event that the debtors are faced with post-confirmation tax liability, the Creditor Plan is not unfair or inequitable since the debtors have had the benefit of the prepetition use of money and property without the burden of paying taxes.

June 7, 1992, Findings Of Fact And Conclusions Of Law. (Petitioners' App. at 60). The conditional nature of the court's finding was due to the fact that, despite extensive testimony and documentary evidence on the issues of values and tax matters, virtual certainty was impossible because Manges had not filed a tax return since 1982. The evidence below was that Manges had at least $11 million in loss carryovers (R.XI.117-18) and that the value of property contributed by him to the Trust was about $2.3 million (Ex.T; R.0337).

Since May 1991, the Trust worked toward satisfying the debtors' almost $80 million in debts with less than $35

million in assets. Unrebutted evidence presented to the district court showed that the Trust paid $1,529,928.88 in claims between confirmation and September 1992. (R.0402-0403). Also in that time, the Trust spent over $580,000 repairing and maintaining the Ranch and over $2 million in repairs and operating expenses connected with oil and gas production from the Ranch. (R.0403-0407). In January 1992, the Trust executed a two-year farm-out agreement of 50,000 acres of mineral land to a Houston oil company, which in turn farmed out acreage to Texaco and Exxon. (R.0408). The Trust also sold working interests, executed oil and gas leases, and entered into gas purchase contracts. (R.0408-0409). In December 1993, the Trust sold the Ranch and mineral interests to a third party for $28.5 million. Only minor assets remain in the Trust.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY DECIDED TO DISMISS THE APPEAL ON MOOTNESS GROUNDS BECAUSE THE PLAN WAS SUBSTANTIALLY CONSUMMATED AND IT WOULD BE INEQUITABLE TO GRANT THE RELIEF REQUESTED

When they proposed the Creditor Plan, SeaFirst and SFA did not write on a blank slate. For almost ten years, they had litigated with Manges. They knew that, with Manges in charge, nothing good would happen to any creditor. Thus, they proposed the Creditor Plan, which not only required them to give up a large administrative expense claim and subordinate all their unsecured claim

to others, but called for them to *donate* almost two million dollars for the benefit of other creditors. All of this they did not only to benefit those creditors who had given money, goods, and services to the Manges debtors and received nothing in return, but to ensure that valuable property, including a 150-square-mile ranch, would not lay fallow any longer.

Similarly, the creditors who supported the Plan remembered the treatment they had received from Manges. Among these were the local *ad valorem* taxing authorities, whose school budgets and road projects had struggled to get along without taxes from 98,000 acres of property for almost 15 years. Included also was the IRS, which understood that the Creditor Plan offered it the only chance of recovering the hundreds of thousands of dollars of payroll taxes Manges had ignored. (*See* Petitioners' App. at 106). Thus, having heard all the testimony about the Manges tax attributes, the Service agreed not to look to the Trust for income taxes after confirmation. These and other creditors knew what Manges would and would not do had his plan been confirmed, and they rejected it soundly. SeaFirst's plan, albeit perhaps not perfect, offered so much better treatment that they accepted it overwhelmingly.

Finally, the bankruptcy court did not suffer from amnesia when it issued the confirmation order. Patiently, it had given the Manges debtors chance after chance to propose a legitimate plan, refusing to lift the stay long after the exclusivity period expired. In the meantime, it observed Manges time and again ignoring adequate protection orders and using cash collateral without permission. There can be no claim, at least made honestly, that

the bankruptcy court denied Manges any opportunity to emerge from Chapter 11 on his own terms. But when those terms were illegal and unfair, the court had no choice but to deny confirmation to the debtors' plan. Taking up SeaFirst's proposal, the court saw the last, best hope for relief to *all* parties. With the landslide votes of the creditors, and following days of hearings, the court confirmed the Creditor Plan and allowed it to go to work.

Since then, the Trust has done everything necessary to fulfill its duties and was able to complete the sale of the last major assets of the Trust. There is light at the end of the tunnel. The Manges debtors should not be allowed to extinguish it.

The Manges debtors' "Statement Of The Case" is generally inaccurate and misrepresents the most important fact, which is uncontroverted in the record, and was significant to the bankruptcy court's findings and the court of appeals' decision: the grantor trust provision would not harm the Manges debtors. *Matter of Manges*, 29 F.3d 1034, 1037 (5th Cir. 1994) (Petitioner's App. at 5-6 and 60). DCRC was a "C" corporation and Manges would not be responsible for its tax liabilities. Man-Gas was a subchapter "S" corporation and the court gave Manges sufficient time to terminate his election to treat it as such and avoid any of its tax liabilities. *Id.* The fact that DCRC and Man-Gas would be left as "empty shells" is not per se improper under the Bankruptcy Code. *See Matter of Sandy Ridge Development Corporation*, 881 F.2d 1346, 1352 (5th Cir. 1989). Manges' contribution to the Trust was relatively minor ($2.3 million), while his tax attributes

were enormous (over $11 million). These facts lead to the bankruptcy court's conclusion that no significant harm will be inflicted on Manges. Accordingly, it is disingenuous to state that "the plan expressly provided that the resulting tax liability was to be satisfied by Clinton Manges personally." (Petition at 5).

A significant omission in the Manges debtors' "Statement Of The Case" is any reference to how much money SeaFirst has irretrievably spent to ensure the success of the Creditor Plan. By misrepresenting the record regarding any harm to Manges and omitting any mention of the significant investment by SeaFirst in reliance on an unstayed, confirmed plan, the Manges debtors create a false foundation for their argument.

The infirmity of their argument's foundation is further weakened by the misdirection of their argument, which goes as follows:

(1) substantial consummation of the Creditor Plan does not mandate a dismissal on mootness grounds if all five of the factors set out in *In re Chateaugay Corporation* are satisfied;

(2) only two of those five factors are of concern – whether granting the relief sought will create an unmanageable situation for the bankruptcy court and impact parties not before the court;

(3) the bankruptcy court will not be faced with an unmanageable situation because the only relief sought is to shift tax liability from Manges to the Trust; and

(4) the only parties affected will be Manges, SeaFirst, and SFA.

The Manges debtors' logic is fatally flawed. Aside from the undisputed fact that Manges will not be harmed by the effect of the grantor trust provision, the Manges debtors disregard the fact that elimination of that provision directly impacts the IRS and the Trust. Those parties have not been before the courts during this appeal. Thus, the Manges debtors cannot even satisfy the *In re Chateaugay* test.

The fact that all of the parties that would be affected by the proposed change were not before the court of appeals also distinguishes the two opinions the Manges debtors rely on to support their argument that the relief sought can be granted. *In re AOV Industries, Inc.* was a case with self-described "unusual circumstances." 792 F.2d 1140, 1141 (D.C. Cir. 1986). First, an objecting creditor subject to unequal treatment under the plan could have its treatment improved because sufficient funds were available. *Id.* at 1149, 1152-53. Second, a pending challenge to attorney fees paid to debtors' counsel could continue because counsel was on notice of the challenges throughout the proceedings and the fees could be returned to the estate for redistribution regardless of the degree of consummation. *Id.* at 1149.

The other case, *In re Chateaugay Corporation*, 10 F.3d 944 (2d Cir. 1993), is not really pertinent. Even though the court speculated that "some effective relief could be granted," *id.* at 954, it did not grant the relief sought and affirmed the lower court's decisions. *Id.* at 961.

The more important flaw in the Manges debtors' argument, however, is the supposition that fulfilling the *In re Chateaugay* factors is the ultimate test. *See, e.g., In re AOV Industries, Inc.*, 792 F.2d at 1147-48 (determinations of mootness on non-article III grounds "cannot be cabined by inflexible, formalistic rules . . . . "). In addition, the circumstances of *In re Chateaugay* are not those present here. For example, in that case provisions of a confirmed Chapter 11 plan concerning the reorganization of a conglomerate were at issue. *In re Chateaugay Corporation*, 10 F.3d at 948. Here, we have a liquidation plan proposed by and administered for the primary benefit of creditors.

The issue that is at the heart of this case and every case in which the mootness doctrine is invoked is equity. *See, e.g., In re Chateaugay*, 10 F.3d at 952 ("the mootness doctrine involves equitable considerations"). Accordingly, the Manges debtors beg the question by attempting to relegate the controversy to the issue of whether the bankruptcy court would be confronted with an unmanageable situation. The court of appeals correctly analyzed several factors and concluded that it would be inequitable to consider the merits of the Manges debtors' appeal. *Matter of Manges*, 29 F.3d at 1043-44 (Petitioners' App. at 22).

The court of appeals was consistent with other courts in recognizing that equitable considerations play a strong role in deciding whether a plan should be modified. *E.g., Matter of UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 509 (1994) ("preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to

unscramble an egg – are so plain and so compelling"); *In re Chateaugay Corporation*, 10 F.3d at 952 ("In bankruptcy proceedings, the mootness doctrine involves equitable considerations as well as the constitutional requirements that there be a case or controversy."); *Matter of Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992) ("the court may consider whether, within the facts of the case, it would be highly inequitable to reverse the bankruptcy court's order."); *In re Public Service Company of New Hampshire*, 963 F.2d 469, 473 (1st Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 304 (1992) ("The case is moot if the required relief would be either inequitable or impracticable in light of the change in circumstances."); *In re Club Associates*, 956 F.2d 1065, 1069 (11th Cir. 1992) ("The test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him."); *In re AOV Industries, Inc.*, 792 F.2d at 1147 ("Even when the moving party is not entitled to dismissal on article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits."); *In re A.J. Mackay Co.*, 50 Bankr. 756, 760 (D. Utah 1985) ("This discretion [to delete provisions the court did not have jurisdiction to confirm] must be exercised with an eye to the rights of those who may be prejudiced by modifying a plan they reasonably relied upon."). Nowhere in their Petition do the Manges debtors address the equitable issue presented in this case other than to baldly state that SeaFirst and SFA "should bear the risk of an erroneous confirmation by the bankruptcy court." Petition at 17. Fortunately, their view of equity as a one

way street leading only to their door is not accepted by the courts.

SeaFirst, SFA, and the Trust were obligated to carry out the Creditor Plan upon confirmation and so long as no stay was obtained. *See* 11 U.S.C. § 1142(a) (West 1993); *In re Riverside Nursing Home*, 137 Bankr. 134, 137 (Bankr. S.D.N.Y. 1992) ("After a Chapter 11 plan has been confirmed the debtor is required to carry out the provisions of the plan . . . . "). The proponents and the Trust have fulfilled their obligations. The court of appeals carefully reviewed the Creditor Plan, the administration of the Plan by the Trust, the failure of the Manges debtors to obtain a stay, the fact that the relief requested would not revitalize the debtors, the significant amounts of money expended by the proponents, and the adverse impact a reversal or modification would have on all creditors in the face of no benefit to the Manges debtors. Based upon all of these factors the court concluded that it would be inequitable to proceed. 29 F.3d at 1043-44 (Petitioners' App. at 22).

The Manges debtors' attempt to create a conflict regarding the court of appeals' statement in note 13 about Bankruptcy Code section 1127(b) with Judge Easterbrook's dictum about that section in the *Matter of UNR Industries, Inc.* 20 F.3d at 769. Their attempt raises at best only a false conflict. As noted above, the court of appeals' decision was grounded on more important considerations; even if it could strike the provision it would be inequitable to do so. Substantial consummation of a plan is not the *sine qua non* of mootness on appeal. Instead, "substantial consummation" is simply that point beyond which a plan cannot be modified. 11 U.S.C. § 1127(b)

(West 1993). By contrast, mootness is a much larger doctrine encompassing jurisdiction and equity based on notions of practicability and fairness, not technical considerations. *In re Public Service Company of New Hampshire*, 963 F.2d at 471.

The meaning the Manges debtors ascribe to Judge Easterbrook's statement in *UNR* is particularly suspect when viewed in the light of his statement a year earlier that: "Modification of a confirmed and substantially consummated plan is forbidden except to the limited extent 11 U.S.C. § 1127 permits." *Holstein v. Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993). Perhaps Judge Easterbrook's statements about section 1127(b) reflect the broader debate over the extent to which a court can impose minor changes of procedure as opposed to significant changes of substance. *See In re Joint Eastern & Southern District Asbestos Litigation*, 982 F.2d 721, 747 (2d Cir. 1992). Of course, the change the Manges debtors propose here is akin to amputating an arm to cure a hangnail – the reassignment of tax liabilities to the two creditors who have irretrievably invested millions of dollars to carry out the Plan in reliance on the courts' decisions.

The other authority relied on by the Manges debtors for their attack on the court of appeals' footnote reference to section 1127(b) is suspect in its logic, to wit: because section 1127(b) states the "proponent of a plan . . . may modify such plan . . . ," it only applies to proponents, not courts. *Compare In re A.J. Mackay Company*, 50 Bankr. at 760 *with Holstein v. Brill*, 987 F.2d at 1270; and *Goodman v. Phillip R. Curtis Enterprises, Inc.*, 809 F.2d 228, 234 (4th Cir. 1987) ("Under § 1127(b), post-confirmation modification can only be initiated by the proponent of a plan or a

reorganized debtor."). More germane to the court of appeals' holding here, though, is the fact that the court in *A.J. Mackay* was addressing a plan that protected a non-debtor guarantor from his creditors for which provision there was no jurisdiction. 50 Bankr. at 760. Another court has interpreted the statement in *A.J. Mackay* to mean that: "[e]ven though only the plan's proponent may file a motion to modify the plan, when the plan contains provisions that are beyond the court's jurisdiction such provisions may be stricken on a motion of one other than the proponent." *In re Davis Broadcasting, Inc.*, 169 Bankr. 229, 234 (Bankr. M.D. Ga. 1994). Of greater interest is the *A.J. Mackay* court's observation that "[b]ecause of the delicacy of the reorganization process, modifications should be allowed after confirmation only in extreme circumstances." *Id.* at 760 n.2. No "extreme circumstances" are presented by the Manges debtors and the provision at issue was within the court's jurisdiction.

Whether courts can bend section 1127 is not really the point here. Clearly, the elimination of an integral part of the Creditor Plan to the detriment of the Trust, the proponents, and other creditors is unjustified, if not prohibited. *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) ("An attack on a sale agreement that is the core and premise of a plan of reorganization is an attack on the plan itself, because the sale could not be undone without rescinding the plan . . . . "); *Matter of Specialty Equipment Companies, Inc.*, 3 F.3d 1043, 1048 (7th Cir. 1993) (Invalidating releases of bondholder class, which constituted an "integral element of the bargain represented by the Plan," in the face of substantial consummation, precluded such relief).

II.

THE COURT OF APPEALS CORRECTLY REFUSED TO REMAND THE CASE FOR THE LIMITED PURPOSE OF CONDUCTING DISCOVERY ON THE MOOTNESS ISSUE BECAUSE THERE WAS NO DISPUTE OVER THE FACTS

Focusing on their ultimate desire to somehow regain possession of the Ranch and mineral interests, the Manges debtors cavil about the court of appeals' refusal to remand the case to permit them to conduct discovery surrounding the sale of the Ranch and mineral interests. In response, the court of appeals first set the issue in its proper place: "[s]ubstantial consummation here is merely a subpart of the overall mootness balancing test . . . . " 29 F.3d at 1041 (Petitioners' App. at 16). That is the point the Manges debtors keep avoiding: the appeal is moot because requested imposition of harm on those who have relied on the unstayed Creditor Plan with no corresponding benefit to the debtors is inequitable.

The evidence concerning the sale is unequivocal. The sales agreements "fail to evidence any contingency upon the outcome of this appeal." 29 F.3d at 1042 (Petitioners' App. at 18). Included in Respondents' Appendix (A-1 through A-4) are the Declarations of the Co-Liquidating Trustee of the Trust and the officer of SeaFirst and SFA who executed pertinent agreements pertaining to the sale on behalf of the Trust, SeaFirst, and SFA. These documents were submitted to the court below along with the Sale Agreement and Ratification Agreement. These declarations under penalty of perjury positively exclude the existence of any other agreement concerning the sale.

In the face of this evidence all the Manges debtors could muster was surmise. Surmise does not create a dispute. *Cf. Contemporary Mission, Inc. v. New York Times Co.*, 665 F. Supp. 248, 269 (S.D.N.Y. 1987) ("plaintiffs must identify specific issues of material fact which are likely to be disclosed if they are granted a reasonable opportunity to pursue the additional discovery they seek."), *aff'd*, 842 F.2d 612 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988); *Automotive Wholesalers of Illinois v. National Union Fire Insurance Company of Pittsburgh, PA.*, 501 F. Supp. 1205, 1212 (N.D. Ill. 1980) (bare hope or suspicion that party will uncover something is insufficient to defeat a motion for summary judgment). In the *Huddleston* opinion relied upon by the Manges debtors, the court merely permitted the opposing party to submit counteraffidavits. *Huddleston v. Nelson Bunker Hunt Trust Estate*, 102 Bankr. 71, 77 (N.D. Tex. 1989). After submission of the counteraffidavits, the district court would determine whether a resolution of "controlling disputed facts" was necessary. *Id.* If so, the district court would remand that matter to the bankruptcy court for resolution. *Id.* In the *In re Hamady Brothers Food Markets* opinion cited by the Manges debtors, there was a genuine dispute over controlling fact issues. 110 Bankr. 815, 818 (E.D. Mich. 1990). The Manges debtors did not submit any affidavits and have not raised any genuine dispute.

Since the sale of the Ranch and mineral interests did not necessarily control the determination that it would be inequitable to grant the relief requested and there was no dispute over the finality of the sale in any event, the court of appeals correctly denied the Manges debtors another opportunity to inflict more delay and expense on their

creditors. The decision of the court of appeals is not in conflict with any other court and is consistent with the accepted and usual course for similar judicial proceedings.

III.

DISMISSAL OF THE CASE UNDER THE CIRCUMSTANCES WAS CONSISTENT WITH LONG STANDING LEGAL PRINCIPLES AND DID NOT VIOLATE THE DUE PROCESS PRINCIPLE OF "FUNDAMENTAL FAIRNESS" OR THE "FRESH START" POLICY OF THE BANKRUPTCY CODE

The third approach the Manges debtors use in attempting to convince this Court that their petition should be granted is the most feeble. After six opportunities to convince the courts below that they were entitled to a stay, the Manges debtors argue that they have been denied due process. Here, they beg the Court's indulgence on the ground that the consequences of their failure to meet the requirements for a stay pending appeal requires that this Court create an exception similar to the "capable of repetition yet evading review" exception to the mootness doctrine. Petition at 16.

The first problem with this argument is that the Manges debtors lack standing to voice the imagined complaints of others who find themselves similarly situated. The Manges debtors have not even argued that they again will be "required to run the gauntlet" of seeking stays pending appeals of future bankruptcy cases. *See DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). Consequently, the issue is certainly not capable of repetition so far as the Manges debtors are concerned. *Id.*

Aside from their lack of standing to invoke a "capable of repetition yet evading review" exception to the mootness doctrine, is a more important oversight. The Manges debtors are asking that the Court overturn the long accepted wisdom of permitting appropriate bankruptcy plans to go forward even though appellate review may be extinguished. *See, e.g., In re Public Service Company of New Hampshire,* 963 F.2d at 471-72 ("important public policy favoring orderly reorganization and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court.' ").

The problem the Manges debtors have consciously ignored throughout this long process is that once they invoked the protection of the Bankruptcy Code, the interests of their creditors became paramount. *See Matter of Texas Extrusion Corp.,* 844 F.2d 1142, 1159 (5th Cir. 1988). The bankruptcy court and district court carefully considered the motions for stays pending appeal. That relief was denied for good reasons. The bankruptcy court summed it up quite concisely: these bankruptcies have run their full course. Appendix at A-5.

Next, the Manges debtors argue they have been denied a "fresh start" even though almost $80 million of their liabilities have been discharged. Resorting to the totally unfounded suggestion that they face "hundreds of thousands of dollars in tax liability" (Petition at 17) only emphasizes again the infirmities of their argument. The uncontroverted evidence below is that there should not be any significant post-confirmation income tax liability to Manges. (Petitioners' App. at 60). The bankruptcy court noted in rejecting their motion for a stay that "even the debtors will benefit from the resolution of the debts

satisfied by the plan." Appendix at A-8. If they have to suffer some future inconvenience, they have only themselves to blame. After all, the "fresh start" to which they are entitled extends only to relief from the oppressive debts incurred prior to bankruptcy, but does not relieve them of every conceivable disability incurred as a result of bankruptcy. *See In re Dabney*, 3 Bankr. 719, 720 (E.D.N.Y. 1980).

CONCLUSION

For the foregoing reasons, Respondents Seattle-First National Bank and SeaFirst America Corporation request (1) that the Court deny Petitioners Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors' petition for writ of certiorari or (2), in the alternative, if it grants certiorari, that it affirm the opinion and judgment of the Fifth Circuit Court of Appeals on the merits.

Respectfully submitted,

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Attorney of Record for Respondents Seattle-First National Bank and SeaFirst America Corporation

No. 94-1111

In The

Supreme Court of the United States

October Term, 1994

CLINTON MANGES, DUVAL COUNTY RANCH COMPANY, AND MAN-GAS TRANSMISSION COMPANY, DEBTORS,

Petitioners,

v.

SEATTLE-FIRST NATIONAL BANK AND SEAFIRST AMERICA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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DECLARATION OF WILLIAM R. SPENCER

STATE OF WASHINGTON §
§
COUNTY OF KING §

I, WILLIAM R. SPENCER, hereby declare as follows:

1. I am a Vice-President of Seattle First National Bank ("**SeaFirst**") and the President of SeaFirst America Corporation ("**SFA**"). My business address is 800 Fifth Avenue, Floor 29, Seattle, Washington 98124.

2. I am over the age of eighteen years and am fully competent to make this declaration. I have relied upon personal knowledge and information provided me by my agents in compiling the facts stated herein.

3. On December 8, 1993, I executed on behalf of SeaFirst and SFA (collectively, "**SeaFirst**") the Ratification Agreement that is attached to this declaration as Exhibit 1. Exhibit 1 is a true and correct copy of the Ratification Agreement signed by me on behalf of SeaFirst.

4. Other than the Ratification Agreement, SeaFirst has no other agreements, contracts, or understandings with Radcliffe Killam and Sue Spivey Killam, Tenants for a Term Certain with ROS.01/01/89, a Complex Trust, or with Killam Investments, a Texas general partnership (collectively, "**Killam**"), that concern, relate to, or are connected in any way with the sale, transfer, assignment, or conveyance by the Manges Liquidating Trust ("**Trust**") of the Duval County Ranch, any mineral interests or properties thereunder, or any other property or asset of the Trust. The Ratification Agreement represents the only

agreement, contract, or understanding between SeaFirst and Killam relating to the sale, transfer, assignment, or conveyance by the Trust of any Trust property or asset.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 3, 1994.

/s/ William R. Spencer
WILLIAM R. SPENCER

DECLARATION OF JOHN HEMSTREET

STATE OF WASHINGTON §
§
COUNTY OF KING §

I, JOHN HEMSTREET, hereby declare as follows:

1. I am the Co-Liquidating Trustee of the Manges Liquidating Trust ("**Trust**"). My business address is 800 Fifth Avenue, Floor 29, Seattle, Washington 98124.

2. I am over the age of eighteen years and am fully competent to make this declaration. I have relied upon personal knowledge and information provided me by my agents in compiling the facts stated herein.

3. Effective July 16, 1993, I executed on behalf of the Trust the Real Estate Exchange and Sale Agreement (**"Sale Agreement"**) that is attached to this declaration as Exhibit 1. Exhibit 1 is a true and correct copy of the Sale Agreement signed by me on behalf of the Trust.

4. Exhibit 2 is a true and correct copy of a Notice to Purchasers Duval County Conservation and Reclamation District.

5. Other than the Sale Agreement, Exhibit 2, and the covenants and agreements contained in the deeds and assignments on file in the Official Public Records of Duval and Webb Counties, Texas, (which are attached as exhibits to Appellees' January 18, 1994 Appendix to Cross-Appellants' Reply Brief) the Trust has no other agreements, contracts, or understandings with Radcliffe Killam and Sue Spivey Killam, Tenants for a Term Certain with ROS.01/01/89, a Complex Trust, or with Killam

Investments, a Texas general partnership (collectively, "**Killam**"), that concern, relate to, or are connected in any way with the sale, transfer, assignment, or conveyance by the Trust of the Duval County Ranch, any mineral interests or properties thereunder, or any other property or asset of the Trust.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 1994.

/s/ John Hemstreet
JOHN HEMSTREET
Co-Liquidating Trustee
Manages Liquidating Trust

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE DUVAL COUNTY RANCH COMPANY DEBTOR	§ § § § § §	NO. 89-01286-C-11
MAN-GAS TRANSMISSION COMPANY DEBTOR	§ § § § §	NO. 89-01532-C-11
CLINTON MANGES, DEBTOR	§ § §	NO. 89-01531-C-11

ORDER DENYING EMERGENCY MOTIONS
FOR STAY PENDING APPEAL

On the 10th day of June, 1991, this Court considered the Emergency Motion for Stay Pending Appeal of the "Order Confirming First Amended Creditors' Plan of Reorganization of Seattle First National Bank and SeaFirst America Corporation" ("**Confirmation Order**"), filed by Debtors Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company. After counsel for the debtors were informed of this Court's execution of a corrected order confirming the Creditor Plan ("**Corrected Order**"), an oral motion to allow the Emergency Motion for Stay Pending Appeal to apply to the Corrected Order was made, and such motion was granted. Accordingly, this order disposes of both the Emergency Motion for Stay Pending Appeal as originally filed as well as an emergency motion for stay of the Corrected Order.

The Court, after receiving proffers of testimony from the debtors, reviewing the Emergency Motion for Stay Pending Appeal and the brief filed in support thereof, and hearing the arguments of counsel for the debtors, and of counsel for creditors Seattle-First National Bank, SeaFirst America Corporation, Law Offices of Royal D. Adams, P.C., and certain of the ad valorem taxing authorities, declines to stay either the Confirmation Order or the Corrected Order for at least the following reasons:

1) The debtors have failed to demonstrate either a likelihood of success on the merits of their appeal or the existence of significant legal issues for presentation in that appeal. Specifically:

a) In the event the Creditor Plan were not confirmed, there exist in these cases overwhelming grounds for removal of the automatic stays protecting the debtors' assets. Since foreclosure on these assets by secured creditors would leave little, if anything, for distribution to the administrative and unsecured claimants, confirming a plan that offers all parties the opportunity to receive some recovery is fair and equitable.

b) The Court believes that the financial strength of the proponents of the Creditor Plan and the existing assets of the Proponents dedicated to its consummation demonstrate that the liquidation will be successful.

c) A review of the applicable law indicates that the Creditor Plan calls for the creation of a grantor trust, and that there will be no federal tax consequences flowing from the creation and operation of the trust. In addition, the Internal Revenue Services' knowledge of and participation in these proceedings binds them to this

Court's findings and conclusions regarding the grantor trust.

d) Helen Ruth Manges had knowledge of the confirmation of the Creditor Plan. No property interests owned by her will be affected by the plan. She has no homestead right and has made no homestead claim to any estate property other than a 200-acre tract in which a prior judicial determination declared that she had no homestead.

e) This Court had jurisdiction to affect the property of the estate, including the jurisdiction to take such acts as may effectively moot appeals currently pending before the Fifth Circuit Court of Appeals.

f) There is no homestead in favor of any person on any of the property owned by the estates of these debtors. The finding of no homestead is supported by final judicial determinations by the United States District Court for the Western District of Texas and by the evidence received by this Court at the confirmation hearings on the Creditor Plan.

g) Substantive consolidation is proper, fair and supported by the evidence presented to the Court.

h) None of the amendments to the Creditor Plan presented by the Proponents at the confirmation hearings are material, and none of them adversely affect any party who voted in favor of confirmation.

2. The debtors have failed to demonstrate any irreparable harm that would result to them if the stay is

not granted. All of the debtors are insolvent, and forestalling the effectuation of the Creditor Plan will not work to the benefit of any of the parties in these cases: even the debtors will benefit from the resolution of the debts satisfied by the plan.

3. Substantial harm to others will result if the stay is granted. The unsecured creditors will receive nothing if the Creditor Plan is not effectuated: if the plan were not confirmed, ample grounds existed for the lifting of the stays and the allowance of foreclosure by the secured creditors. Moreover, all secured creditors have voted for the plan, and would accordingly be harmed if its effects were stayed. Payments to the ad valorem taxing authorities would not be made if a stay were granted, resulting in yet further delays in recovery by their respective schools and governments of taxes dating back over ten years.

4. No public good would be served by the issuance of a stay pending appeal. There is a substantial public policy being served when a plan is confirmed by an overwhelming majority of the voting creditors. A further interest is accommodated by the conclusion of bankruptcy proceedings that have pended for over twenty months, particularly when the conclusion satisfies creditors whose debts are almost ten years past due. It is the opinion of this Court that these bankruptcies have run their full course. The debtors were given full opportunity to present a confirmable plan to the Court and the creditors. When they presented a plan, it was neither accepted by the majority of creditors nor confirmed by this Court. The subsequent Creditor Plan was the only confirmable plan presented to this Court. While this Court recognizes

that a stay pending appeal may issue from the district court, it likewise recognizes that no apparent good would be served by furthering the liquidation of these debtors and would, if such stay is granted, entertain the pending motions to lift the stays to allow the secured creditors to foreclose, leaving the unsecured creditors and administrative claimants with very little chance of recovery.

In view of these findings and conclusions:

IT IS ORDERED that the Emergency Motion for Stay Pending Appeal of this Court's Confirmation Order filed by the debtors in these cases be, and the same hereby is DENIED; and, it is

FURTHER ORDERED that the oral emergency motion for stay pending appeal of this Court's Corrected Order be, and the same hereby is DENIED; and, it is

FURTHER ORDERED that all other relief not specifically discussed herein be, and the same hereby is DENIED.

SIGNED and ORDERED ENTERED this date: June 28, 1991

/s/ Richard S. Schmidt
RICHARD S. SCHMIDT
UNITED STATES .
BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE: DUVAL COUNTY RANCH COMPANY, CLINTON MANGES, AND MAN-GAS TRANSMISSION CO.	§	MISC. NO. C-91-23
V.	§	
SEATTLE FIRST NATIONAL BANK AND SEAFIRST AMERICA CORP., ET AL.	§	

ORDER DENYING MOTION FOR STAY PENDING APPEAL

(Filed July 16, 1991)

Debtors Duval County Ranch Company, Clinton Manges, and Man-Gas Transmission Co. appeal the confirmation by the Bankruptcy Court of the First Amended Creditors' Reorganization Plan ("the Plan"). Debtors move for a stay of the implementation of the Plan.

After a hearing on the merits of this motion, this Court denies debtors' motion for stay. This Court will supplement this Order with findings of fact and conclusions of law.

This Court grants to debtors leave for interlocutory appeal of this Order.

ORDERED this 15 day of July, 1991.

/s/ Hayden W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
DUVAL COUNTY RANCH COMPANY, CLINTON MANGES, AND MAN-GAS TRANSMISSION COMPANY	§ § § § § §	MISC. NO. C-91-23

MEMORANDUM IN SUPPORT OF ORDER DENYING MOTION FOR STAY PENDING APPEAL

(Filed July 26, 1991)

On July 12, 1991, this Court denied the motion by debtors Duval County Ranch Company, Clinton Manges, and Man-Gas Transmission Company ("debtors") for a stay pending appeal of the bankruptcy court's Order Confirming First Amended Creditors' Plan of Reorganization and the corrected order confirming the Plan. The denial followed a hearing at which the Court heard testimony, considered documentary evidence, and heard the arguments of counsel for various parties.

This memorandum contains findings of fact and conclusions of law in support of the Court's oral order denying the motion issued on July 12, 1991, and the written order denying the motion issued on July 15, 1991.

FINDINGS OF FACT

This Court finds the following facts:

1. Duval County Ranch Company ("DCRC") filed its voluntary petition in these proceedings for relief

under Chapter 11 of the United States Bankruptcy Code on August 14, 1989.

2. Clinton Manges ("Manges") and Man-Gas Transmission Company ("Man-Gas") were made the subjects of separate involuntary petitions for relief under Chapter 11 of the United States Bankruptcy Code filed on October 2, 1989.

3. On or about January 29, 1991, Seattle-First National Bank ("Bank") and SeaFirst America Corporation ("SeaFirst America") (together, "the proponents") filed the Creditor Plan and their First Amended Original Disclosure Statement to First Amended Original Creditors' Plan of Reorganization ("Disclosure Statement").

4. The bankruptcy court approved the Disclosure Statement as containing adequate information under 11 U.S.C. § 1125 in an Order Approving Disclosure Statement and Fixing Time for Filing Acceptances and Rejections of Plan, Combined with Notice Thereof ("Disclosure Statement Order) dated March 11, 1991. The Disclosure Statement Order contained certain modifications to the Creditor Plan that were approved by the bankruptcy court.

5. A copy of the Creditor Plan, the Disclosure Statement, the Disclosure Statement Order, and court-approved ballots were transmitted to all persons requiring notice in compliance with the Disclosure Statement Order and the Bankruptcy Rules.

6. The Creditor Plan was accepted in writing by the creditors and equity security holders whose acceptance was required by law. Specifically, classes 3, 5, 6, 7, 8, 9, 10,

17, and 18 were impaired and accepted the Plan, without considering the votes of insiders.

7. The proponents requested confirmation of the Creditor Plan under the cramdown provisions of 11 U.S.C. § 1129(b).

8. As of the date of the initial hearing on confirmation, no class of secured creditors rejected the Plan.

9. On May 1, 13, and 20, 1991, evidentiary hearings were held before the Honorable Richard S. Schmidt, United States Bankruptcy Judge for the Southern District of Texas, on confirmation of the Plan.

10. On May 29, 1991, Judge Schmidt heard oral arguments on confirmation of the Plan.

11. On May 31, 1991, Judge Schmidt signed the Confirmation Order.

12. On June 7, 1991, Judge Schmidt signed the Corrected Order, which was effective *nunc pro tunc* as of May 31, 1991.

13. Also on June 7, 1991, the debtors filed an Emergency Motion for Stay Pending Appeal of the Confirmation Order and the Corrected Order ("bankruptcy court stay motion").

14. On June 10, 1991, Judge Schmidt conducted a telephonic hearing on the bankruptcy court stay motion.

15. Also on June 10, 1991, Judge Schmidt orally denied the bankruptcy court stay motion, and on June 28, 1991, signed an order denying the bankruptcy court stay motion.

16. On June 17, 1991, the debtors filed their Second Notice of Appeal, in which they appealed Judge Schmidt's Confirmation Order and Corrected Order to this Court.

17. Also on June 17, 1991, the debtors filed their Emergency Motion for Stay Pending Appeal ("district court stay motion"), and requested from this Court an immediate telephonic hearing on the issuance of a temporary stay of the Confirmation Order and the Corrected Order pending full evidentiary hearing on the district court stay motion. This Court held that hearing on June 17, 1991. At the conclusion of the telephonic hearing, this Court declined to issue a temporary stay.

18. On July 12, 1991, a hearing after notice to all parties was held on the district court stay motion. Though given due notice of the hearing, counsel for Man-Gas refused or failed to appear.

19. At the hearing, the Court heard testimony from Manges; David D. Towler, III, counsel for The Law Offices of Royal D. Adams, P.C.; Gary Williams, the liquidating trustee appointed under the Plan ("liquidating trustee"); and Dr. Dannah Procter, Interim Superintendent of the Freer Independent School District.

20. Based upon the testimony received by the Court, the pleadings, the documents and exhibits introduced at the hearing, as well as the matters presented to the Court from the bankruptcy court's record by judicial notice, the Court finds the following:

a) By the voting deadline, 127 ballots were cast by non-insider creditors in connection with the Plan.

b) Of the ballots cast by non-insiders, 120 creditors holding approximately $78,969,277 in claims accepted the Plan.

c) These acceptances represented 94.5% of the voting non-insiders and 99.74% of the claims of voting non-insiders.

d) By the initial hearing on confirmation, all secured creditors who voted, including Freer, Benavides, and Webb County Independent School Districts and Duval County, had accepted the Plan

e) The debtors have not paid ad valorem taxes for the years 1977-1979 and 1982-1990, though debtors may have paid some portion of their 1982 taxes. The proponents paid the ad valorem taxes for 1990.

f) In the bankruptcy court, the debtors did not place a value on pending adversary proceedings to which they were parties.

g) No debtor or debtor dependent properly claimed a homestead interest in any of the property of the bankruptcy estate.

h) The debtors presented no evidence of a homestead claim by any person.

i) Helen Ruth Manges had actual knowledge of the Plan.

j) Helen Ruth Manges did not object or appear at the Plan confirmation hearings.

k) The debtors have not shown evidence of any surety or bond.

l) Title to bankruptcy estate property has been conveyed to the liquidating trustee.

m) The liquidating trustee has hired a manager for the 99,000-acre Duval County Ranch ("Ranch"). The ranch manager has begun repairing fences, water systems, and houses on the Ranch.

["n)" and part of "o)" missing in original]

debtors. The operator has begun reworking and operating the wells.

p) The liquidating trustee has collected or obtained control over personal property of the debtors' estates.

q) The Bank is paying casualty insurance coverage on the Ranch.

r) The liquidating trustee is in the process of collecting money held in suspense by purchasers of oil and gas.

s) The collections by the liquidating trustee will be supplemented, if necessary, by the Bank to make a $750,000 payment to the ad valorem taxing authorities within the next several weeks.

t) The Freer I.S.D. already has budgeted approximately $330,000 of that $750,000.

u) The Freer I.S.D. has had to reduce teacher and other employee salaries, educational programs for students, and maintenance of school property as a result of insufficient tax revenue.

v) If the stay were granted, the liquidating trustee is uncertain how maintenance, security and operation of the estate property would be financed, or how the current expenses would be paid.

w) Manges is the sole shareholder of DCRC and also is the sole shareholder of Man-Gas.

x) Manges estimates that it will take the liquidating trustee two to three years to sell the Ranch and the mineral estate.

y) The debtors did not challenge the foreclosure sale of the Maverick County Ranch until after the purchase by Winn Exploration Company.

z) David D. Towler, III has represented the debtors in pre-bankruptcy matters and has continued to represent Helen Ruth Manges in various legal matters.

aa) David D. Towler, III clearly is biased in favor of debtors.

bb) The creditors have lost large amounts of money during the time the debtors have been litigating.

21. After a review of those findings of fact issued by Judge Schmidt on June 7, 1991, relating to the issues raised in the district court stay motion and at the hearing thereon, the Court finds that Judge Schmidt's findings are not clearly erroneous.

CONCLUSIONS OF LAW

1. Movants seeking a stay must show the following:

a) that they are likely to succeed on appeal, or that there is a substantial question whether the decision of the bankruptcy court will stand on appeal;

b) that without the stay, movants will suffer irreparable harm;

c) that the stay will not cause substantial harm to others; and

d) that the stay will not disserve the public interest. *Ruiz v. Estelle,* 650 F.2d 555 (5th Cir. 1981).

2) Like an injunction, a stay pending appeal is an extraordinary remedy and should be granted sparingly. *Atlantic Richfield Co. v. FTC,* 298 F.Supp. 1, 17 (S.D. Tex. 1975), *aff'd,* 546 F.2d 646 (5th Cir. 1979).

3) The debtors have failed to demonstrate either a likelihood of success on the merits of their appeal or the existence of significant legal issues for presentation on appeal. Specifically:

a) in the event the Plan had not been confirmed, there existed in these cases grounds for removal of the automatic stays protecting the debtors' assets. Since foreclosure on these assets by secured creditors would have left little, if anything, for distribution to the administrative and unsecured claimants, confirmation of a Plan that offered all parties the opportunity to receive some recovery was fair and equitable.

b) Helen Ruth Manges had knowledge of the confirmation of the Plan. She owns no property interests affected by the Plan. She has made no homestead claim to any estate property.

c) The bankruptcy court's finding of no homestead right by any person on the property of the debtors' estates is supported by final judicial determinations by the United States District Court for the Western District of Texas and by

the evidence received by the bankruptcy court at the confirmation hearings on the Plan.

d) Insufficient evidence has been presented to conclude that there is any value to the estates in any of the adversary proceedings.

4. The debtors have failed to demonstrate any irreparable harm that would result to them if the stay is not granted. All of the debtors are insolvent, and forestalling the effectuation of the Plan will not benefit any of the parties.

5. Substantial harm to others will result if the stay is granted. It is probable that the unsecured creditors will receive nothing if the Plan is not effectuated because the bankruptcy court may well lift the stays and allow the secured creditors to foreclose. The debtors have failed to produce sufficient surety for bond pending appeal, and have offered only speculation about their ability to do so. If the Plan were stayed, the taxing authorities would not receive the $750,000 that the liquidating trustee is required by the Plan to pay them within a few weeks. The debtors admitted that they will offer no protection against the immediate losses that the taxing authorities would suffer.

6. No public good would be served by the issuance of a stay pending appeal. On the other hand, public policy definitely favors the immediate partial payment of the large tax debt owed to the ad valorem taxing entities such as schools. Public policy also favors execution of a Plan confirmed by an overwhelming majority of the voting creditors. Public policy is also served by concluding a

bankruptcy proceeding that has lasted as long as this one has.

CONCLUSION

The Court denies the motion for stay pending appeal of the bankruptcy court's Order confirming the Plan.

ORDERED this 25 day of July , 1991.

/s/ Hayden W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES
DISTRICT JUDGE